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Nos. 07-21, 07-25

In The
Supreme Court of the United States

WILLIAM CRAWFORD, *ET AL.*,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, *ET AL.*,
Respondents.

INDIANA DEMOCRATIC PARTY, *ET AL.*,
Petitioners,

v.

TODD ROKITA, *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE*, DORIS ANNE SADLER, IN SUPPORT OF STATE RESPONDENTS

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Ind. Code § 3-6-6-8 (LexisNexis 2007) 4

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(Indiana's "Voter ID Law") ..... passim

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Other Authorities

Andrea Neal, Editorial, *A Tale Of 2 Cities' Elections*, The Indianapolis Star, May 17, 2007, at 14 19

Brendan O'Shaughnessy, *City Wants To Reduce Precincts By '08 Elections; Fewer Polling Sites Will Help With Shortage Of Workers, Mayor Says*, The Indianapolis Star, Sept. 15, 2007, at 1 7

Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections*, 21 (2005), http://www.american.edu/ia/cfer/report/full_report.pdf 9, 11, 12

Editorial, *A Bipartisan Case for Clean, Fair Elections*, Richmond Palladium-Item, Jan. 8, 2007, at A6 ..... 9, 10

Jeffrey Milyo, *The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis*, Inst. of Pub. Pol'y, Report 10-2007 (Nov. 2007), http://web.missouri.edu/~milyoj/files/IPP%20Report%20Corrected.pdf 13, 14

Joe Cermak, *Prosecutor's Office To Determine Whether Signatures Were Valid*, Ball State Daily News (Muncie, Ind.), Nov. 7, 2007, available at http://media.www.bsudailynews.com/media/storage/paper849/news/2007/11/07/News/Prosecutors.Office.To.Determine.Whether.Signatures.Were.Valid-3084848.shtml 6

Lorraine C. Miller, *Statistics of the Congressional Election of November 7, 2006* (2007), http://clerk.house.gov/member_info/electionInfo/2006election.pdf 11

Marion County Clerk's Office, *2007 General Election, Certified Results*, http://imcwwa2k3.indygov.org/elecnight/2007gen/ 7, 15

Mary Beth Schneider, *Ballard Stuns Peterson*, The Indianapolis Star, Nov. 7, 2007, at 1 15

Secretary of State, *Indiana 2007 Mayoral Primary Results*, http://www.in.gov/apps/sos/primary/sos_primary07;jsessionid=uNwyKny9H3a596F8zr?page=office&countyID=-1&partyID=-1&officeID=32&districtID=-1&districtshortviewID=-1&candidate= 10

U.S. Census Bureau, *State & County Quick Facts*, http://quickfacts.census.gov/qfd/states/18/18097.html (last visited Dec. 5, 2007) 1

INTEREST OF *AMICUS CURIAE* [1]

From 2003 through 2006, *amicus curiae* Doris Anne Sadler was the duly elected Clerk of Marion County, Indiana. Marion County is the largest county in Indiana -- home to Indianapolis -- and in 2006 had an estimated population of about 865,500.[2] As Clerk, Ms. Sadler was responsible for administering elections in Marion County. Ms. Sadler oversaw those elections both before and after the enactment of Public Law 109-2005 (Indiana's "Voter ID Law"). As such, Ms. Sadler is qualified to explain the effects of the Voter ID Law on the conduct of local elections in the State. In particular, this brief will contrast the ineffectiveness of Indiana's former, in-person fraud prevention method (signature comparison) with the meaningful protection of voting rights afforded by the Voter ID Law.

SUMMARY OF ARGUMENT

The "prevention of [voter] fraud is a legitimate and compelling government goal." *Dunn v. Blumstein*, 405 U.S. 330, 345 (1972). But, if the measures used to prevent that fraud are illusory, then so too is that goal.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus* and her counsel contributed monetarily to the preparation or submission of this brief.

[2] *See* U.S. Census Bureau, *State & County QuickFacts*, http://quickfacts.census.gov/qfd/states/18/18097.html (last visited Dec. 5, 2007).

Before Indiana enacted its Voter ID Law, poll workers had one tool at their disposal to combat fraud: a comparison of Election Day signatures to those previously entered in the voter registration rolls. Although minimally obtrusive, the effectiveness of signature comparisons as a barrier to fraud was equally negligible. Signature authentication is unquestionably a subjective, and unreliable, means of detecting fraud. Signatures naturally change due to age or other factors, and Indiana's volunteer poll workers have never had the qualifications necessary to conduct an accurate handwriting comparison in a matter of moments. Challenges based upon signature comparisons were inherently unworkable, and presented opportunities for potential manipulation of the process. Moreover, even when an individual's identity was legitimately challenged, that person could still vote, leave the polls, and never be found again. As a result of these issues, an individual's Election Day signature was nothing more than an oath that he or she was that registered voter. Unfortunately, as this Court noted in *Dunn*, "false swearing is no obstacle to one intent on fraud." *Id.* at 346.

For the maxim of "one person, one vote" to have meaning, States must be able to guard against "the diluting effect of illegal ballots." *Gray v. Sanders*, 372 U.S. 368, 380 (1963). "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). If one begins from the premise that signature comparison is inadequate for the task, then the question of whether States should be permitted to require a government-

issued photo ID is not at all difficult. Regardless of the standard of review this Court chooses to apply to the Voter ID Law, there simply is not a more narrowly tailored way of "ensuring that an individual's right to vote is not undermined by fraud in the election process." *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (opinion of Blackmun, J.).

Finally, at its core, Indiana's Voter ID Law represents a political compromise, not a constitutional violation. Judge Posner correctly noted that, in this case, "the right to vote is on both sides of the ledger." *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007). By enacting the Voter ID Law, Indiana has taken legitimate steps to protect the value of legally registered votes. Doing so, the Petitioners contend, may make it more difficult for some theoretical group of voters to exercise their right. Every voting regulation invariably has some impact on some segment of the population of potential voters, *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); yet, this Court has recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Ultimately, it must be up to the Petitioners to demonstrate a constitutional violation as a matter of fact, not speculation. *See Purcell v. Gonzalez*, 127 S. Ct. 5, 8 (2006) (Stevens, J., concurring) (these important constitutional issues should "be resolved correctly on the basis of historical facts rather than speculation"). As the District Court found, the Petitioners presented only the latter. And, to date, the only empirical study of Indiana's Voter ID Law has

reached conclusions that directly undermine the speculative claims of Petitioners.

In sum, Indiana's Voter ID Law has provided a measure of integrity to elections that did not exist previously. In a time when voter confidence in the election process is demonstrably low, and vote margins increasingly slight, the security provided by Indiana's Voter ID Law far outweighs the theoretical inconveniences argued by the Petitioners. It should be upheld.

ARGUMENT

I. INDIANA'S SIGNATURE REQUIREMENT DID NOTHING TO PREVENT VOTE FRAUD.

In Marion County, Indiana, polling places are staffed by five officials: two clerks (one from each major political party), two judges (same), and one inspector (selected by the political party whose candidate for Secretary of State won the county in the last election). Ind. Code §§ 3-6-6-1, -2, -8 (LexisNexis 2007). Any of the five officials may challenge the qualifications of an individual to vote. Until recently, however, the only thing standing between the polls and someone intent on fraudulently voting was a signature.

Six years ago, an individual in Indiana could vote, leave the polling place, and have his or her vote counted automatically -- even if a poll official challenged that person's identity. If a challenge was made, the voter and poll official would both sign affidavits evidencing the challenge, but the voter was

still permitted to submit a ballot that counted. Although authorities could later investigate the challenged vote, the only evidence at their disposal would be the two affidavits and poll book signatures. Even if the vote could be proven fraudulent, there was no way to track down the offender, because the only address available to authorities was that of the legitimately registered voter in the poll book (if that person was still alive and at the same address). In 2002, Congress enacted the Help America Vote Act ("HAVA"). Pub. L. No. 107-252, 116 Stat. 1666 (2002). With HAVA came the widespread use in Indiana of provisional ballots, but the Act did not address the systemic problem of relying on signature verification as the only protection against fraud. And, because challenged votes were no longer automatically counted, implementing HAVA also increased the incentive for partisan challenges based on capricious signature comparisons.

Under either system, Indiana's procedures to guard against fraud were inherently arbitrary and demonstrably ineffective. Although federal courts routinely subject proffered handwriting-analysis testimony to scrutiny under Evidence Rule 702, *see, e.g.*, *United States v. Mornan*, 413 F.3d 372, 380 (3d Cir. 2005), Indiana's volunteer poll workers have been expected to make accurate handwriting comparisons, in a matter of moments, without any objective standards to apply.[3]

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[3] The Brief for Respondent Marion County Election Board provides on-line cites for its current poll-worker training slides. *See* Br. For Resp't Marion County Election Bd. at 4 n.3. Notably,

Election workers -- naturally hesitant to deny anyone a vote based on such an imperfect and subjective analysis -- saw little value in the signature comparisons. A challenge based upon a signature comparison might be unfounded because of a mere evolution in one's handwriting. As former Indiana State Senator Allie Craycraft explained to the *Ball State Daily News* in November 2007, "I registered to vote 75 years ago, and my signature has changed since then. If people are being refused the right to vote because of their signature not matching, they are being treated unfairly."[4]

Equally frustrating, Indiana's signature requirement provided no way to determine whether an individual was intent on defrauding the system because a signature, in itself, offered no verification of someone's identity. Nor was on-sight recognition of individuals ever a "time-tested system" of detecting fraud, as the Respondent Marion County Election Board's brief asserts. Br. of Resp't Marion County Election Bd. at 6. Belying the quaint notions of "neighborhood voting" described by the Election Board, *id.* at 4, Marion County, Indiana, has 630,993 voter

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not one of the presentations cited offers guidance on how to verify a voter's signature.

[4] Joe Cermak, *Prosecutor's Office To Determine Whether Signatures Were Valid*, Ball State Daily News (Muncie, Ind.), Nov. 7, 2007, available at http://media.www.bsudailynews.com/media/storage/paper849/news/2007/11/07/News/Prosecutors.Office.To.Determine.Whether.Signatures.Were.Valid-3084848.shtml.

registration records.[5] Spreading the votes of that many people across 914 precincts has proven to be a logistical nightmare, because there simply are not enough poll workers to staff every station. *Id.*; Brendan O'Shaughnessy, *City Wants To Reduce Precincts By '08 Elections; Fewer Polling Sites Will Help With Shortage Of Workers, Mayor Says*, The Indianapolis Star, Sept. 15, 2007, at 1. The notion that the poll workers who are available would recognize any consequential number of voters (or, more important, an imposter) on sight has no basis. Rather, before Indiana's Voter ID Law, Marion County voters (legitimate or not) merely signed in, cast their ballots, and left the polling place never to be seen again. And, signature comparisons did nothing to help identify the presence of, or stop, any voter impersonation fraud, particularly in a highly populated urban area such as Marion County.

In *Dunn v. Blumstein*, this Court invalidated Tennessee's durational residence law, in part because there was no evidence "that durational requirements [were] in fact necessary to identify bona fide residents" and prevent voter fraud. 405 U.S. at 346. This Court stated that the durational requirement "add[ed] nothing . . . to stop fraud" because, in Tennessee, one's residence qualifications were established by an oath given when the individual registered to vote. *Id.* "Since false swearing is no obstacle to one intent on fraud," this Court reasoned, "the existence of burdensome

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[5] *See* Marion County Clerk's Office, *2007 General Election, Certified Results*, http://imcwwa2k3.indygov.org/elecnight/2007gen/.

voting qualifications like durational residence requirements [would not] prevent corrupt nonresidents from fraudulently registering and voting." *Id.*

Indiana's use of signatures as the only Election Day safeguard was similarly "no obstacle to one intent on fraud." Thus, the underlying question in this case is whether States may institute meaningful and minimally intrusive measures to guard against voter fraud, or forever retain such meaningless and arbitrary oath-swearing rituals.

II. INDIANA'S VOTER ID LAW PROVIDES MEANINGFUL PROTECTION AGAINST VOTE DILUTION AND DOES SO IN THE LEAST INTRUSIVE MANNER POSSIBLE.

In 2005, Indiana passed its Voter ID Law to address the significant concerns raised by the previous statutory regimes. The positive effects on Indiana elections were immediate. Poll officials acquired a meaningful tool to ascertain a voter's identity: a government-issued photo identification. Voters, too, immediately took to the new requirements. *Amicus* Sadler observed that most voters arrived at polls with ID in hand, ready to present it to poll officials. She received no complaints that producing a photo ID was intrusive in any way. And, she received no report of any individual unable to vote because he or she could not obtain the required identification or qualify for one of the law's several exemptions.

All of this was likely due to the extensive and thoughtful efforts of Indiana's state and county officials to educate the public regarding the law's

requirements. The Marion County Election Board's current position is that educating the public amounts to "encourag[ing] the notion that voting is difficult." Br. of Resp't Marion County Election Bd. at 13. That statement flies in the face of election officials' duties to inform the public any time an election regulation is enacted or changed. It also invites the question of how Petitioners would have responded had Indiana enacted its Voter ID Law but made no effort to inform the public of its requirements.

In any event, in 2005, Indiana's legislature finally took affirmative steps toward instilling confidence in an increasingly cynical electorate that every vote did, indeed, matter. And Indiana was not alone in this endeavor. In September 2005, the Commission on Federal Election Reform issued its bipartisan report recommending that all States require photo identification cards at polling places (the "Carter-Baker Report").[6] Though perhaps convenient to designate voter-identification laws as a Democrats-versus-Republicans issue, the Carter-Baker Report emphasized that voter confidence in elections is not a partisan issue. "Fraud in any degree and in any circumstance," the Report noted, "is subversive to the electoral process."[7]

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[6] Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections*, 21 (2005), http://www.american.edu/ia/cfer/report/full_report.pdf.

[7] *Id.* at 45. Locally, Indiana newspapers have echoed the same sentiment. For example, the Richmond (Ind.) *Palladium-Item* has editorialized, "Honest elections are not the province or platform of one party above another." Editorial, *A Bipartisan Case for Clean,*

This Court has similarly recognized that States have a "compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process." *Burson*, 504 U.S. at 199. "The Court thus has 'upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.'" *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)). That interest in protecting the integrity of the electoral process is perhaps as compelling now as it has ever been.

Petitioner Indiana Democratic Party notes "Indiana's long standing history of razor thin election margins," and points out that "[t]hree 2006 Indiana House elections were subjected to recounts because only 7, 15, and 27 votes separated the leading candidates." Br. of Pet. Ind. Democratic Party at 19; *see also id.* at n.15 (collecting cases discussing narrow election margins in Indiana). In 2007, seven mayoral primaries in Indiana were decided by fewer than twenty votes.[8] Of course, narrow election margins are not exclusive to Indiana. In 2006, eighteen races for seats in the United States House of Representatives were decided by three percentage points or less; seven

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Fair Elections, Richmond Palladium-Item, Jan. 8, 2007, at A6. In that editorial board's opinion, the Seventh Circuit's decision in this case "offered a voice of reason amid the shrill noise." *Id.*

[8] *See* Secretary of State, *Indiana 2007 Mayoral Primary Results*, http://www.in.gov/apps/sos/primary/sos_primary07;jsessionid=uNwyKny9H3a596F8zr?page=office&countyID=-1&partyID=-1&officeID=32&districtID=-1&districtshortviewID=-1&candidate=.

of those by less than one percent.[9] Virginia's Senate race, in which 2,370,445 ballots were cast, was decided by less than half of one percentage point.[10]

The overriding concern must be what, if anything, States can do to ensure that such close elections are being decided legitimately. As this Court acknowledged in *Gray v. Sanders*, illegally cast ballots have the same "diluting effect" as improperly drawn geographical districts. 372 U.S. at 380. And, as the Carter-Baker Report explained, while "[t]here is no evidence of extensive fraud in U.S. elections or of multiple voting, . . . both occur, and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."[11]

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[9] Connecticut's 2nd District was decided by 83 votes (out of 242,413 cast). Florida's 13th District was decided by 369 votes (out of 238,249 cast). Georgia's 12th District was decided by 864 votes (out of 142,438 cast). New Mexico's 1st District was decided by 861 votes (out of 211,111 cast). Ohio's 15th District was decided by 1,055 votes (out of 220,567 cast). Pennsylvania's 8th District was decided by 1,518 votes (out of 249,817 cast). And Wyoming's race was decided by 1,012 votes (out of 196,215 cast). Lorraine C. Miller, *Statistics of the Congressional Election of November 7, 2006* (2007), http://clerk.house.gov/member_info/electionInfo/2006election.pdf

[10] *Id.*

[11] Carter-Baker Report, *supra* note 6, at 18. The Report specifically cited Washington Governor Christine Gregoire's 129-vote victory in 2004 as exemplifying these concerns. After that election, the Report noted, "the elections superintendent of King

Depending on which standard of review this Court chooses to apply to Indiana's Voter ID Law, the issue could be stated in one of two ways: (1) whether there is a more narrowly tailored, or less drastic, method to ensure the integrity of Indiana's election process, *see Dunn*, 405 U.S. at 345; or (2) whether the State's interest in ensuring that integrity is generally sufficient enough to justify the law's requirements, *see Burdick*, 504 U.S. at 434. But whichever way one looks at it, the inescapable conclusion is that no regulation, short of a photo-identification requirement, provides for meaningful verifications of voters' identities.

Simply put, until it enacted its Voter ID Law, Indiana had no effective fraud-detection safeguards. The same cannot be said today. That is a development that should be celebrated, not reversed.

III. WITHOUT CONCRETE EVIDENCE OF A CONSTITUTIONAL VIOLATION, STATES SHOULD BE LEFT TO DETERMINE WHAT REGULATIONS ARE NECESSARY TO PROVIDE FOR FAIR AND HONEST ELECTIONS.

In the past, this Court has rejected the notion that election regulations could or should be deemed unconstitutional based only on speculation that they will adversely impact the plaintiffs. *See, e.g.*, *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 589 (1972) ("Nothing in the record shows that appellants have

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County testified . . . that ineligible ex-felons had voted and that votes had been cast in the names of the dead." *Id.* at 4.

suffered any injury thus far, and the law's future effect remains wholly speculative."). In 2006, Justice Stevens' concurring opinion in *Purcell v. Gonzalez* noted that, "[g]iven the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation." 127 S. Ct. at 8 (Stevens, J., concurring). The Petitioners in this case, however, presented nothing more than speculation to the District Court, the Seventh Circuit, or this Court.

If this Court is to be guided by historical fact, rather than speculation, at least two resources are available: (1) Respondent Todd Rokita and *amicus* Sadler's hands-on experience administering Indiana election law; and (2) Professor Jeffrey Milyo's November 2007 study, "The Effects Of Photographic Identification On Voter Turnout In Indiana: A County-Level Analysis."[12] Professor Milyo's report -- the only empirical analysis of its kind specific to Indiana -- reaches conclusions diametrically opposed to the untethered theories advanced by Petitioners. Examining Indiana's 2002 and 2006 mid-term elections, Professor Milyo determined:

> Overall, voter turnout in Indiana increased about two percentage points from 2002 to 2006; however, in counties with greater percentages of

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[12] Jeffrey Milyo, *The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis*, Inst. of Pub. Pol'y, Report 10-2007 (Nov. 2007), http://web.missouri.edu/~milyoj/files/IPP%20Report%20Corrected.pdf.

> minority or poor voters, turnout increased by even more, although this increase is not statistically significant. For counties with greater percentages of elderly or less educated voters, results are more mixed, but not consistently significant or negative. The only consistent and frequently significant effect of voter ID that I find is a positive effect on turnout in counties with a greater percentage of Democrat-leaning voters.[13]

By contrast, Petitioners have persistently claimed only that the Voter ID Law adversely affects some unidentified, hypothetical segment of the voting population. Setting aside academic, theoretical, and political arguments on all sides, this Court should not ignore the District Court's straightforward factual findings on this specific point. As Judge Barker stated, despite every incentive to do so, the Petitioners

> failed to submit: (1) evidence of any individuals who will be unable to vote or who will be forced to undertake appreciable burdens in order to vote; and (2) any statistics or aggregate data indicating particular groups who will be unable to vote or will be forced to undertake appreciable burdens in order to vote.

Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 822 (S.D. Ind. 2006).

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[13] *Id.* at 1.

In this Court, the Marion County Election Board also argues -- similarly, without any record support -- that voters are being turned away as a result of the Voter ID Law. As support, the Election Board states that thirty-two of thirty-four voters in Marion County who cast provisional ballots in the 2007 municipal election did not return with photo ID within ten days. Br. of Resp't Marion County Election Bd. at 8-9. But what is this Court to make of that? The Election Board's "evidence" that the Voter ID Law "has deprived otherwise-qualified persons from exercising their right to vote," *id.* at 13, should be put into context, if accepted at all.

There are 630,993 voter registration records in Marion County.[14] The 2007 election for Indianapolis' next mayor brought 165,002 of those registered voters to the polls, and the race was decided by 5,312 votes.[15] The night of the election, incumbent Mayor Bart Peterson conceded to challenger Greg Ballard. Mary Beth Schneider, *Ballard Stuns Peterson*, The Indianapolis Star, Nov. 7, 2007, at 1. It is likely that, in this context, the thirty-two voters cited by the Election Board made a simple cost-benefit analysis and decided not to return and verify their identities. Thus, any effect on those thirty-two votes -- which would have accounted for less than two hundredths of a percent of all Election Day votes in Marion County -- was not a product of the Voter ID Law, but rather the

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[14] *See* Marion County Clerk's Office, *supra* note 5.

[15] *Id.* Nor was any race for the City-County Council decided by a margin that would have been affected by thirty-two additional votes. *Id.*

likely product of voter choice. Alternatively, it may well be that some of those thirty-two voters were not who they claimed to be. In that case, the Voter ID Law *would have done its job* by preventing fraudulent votes from being counted, and it cannot seriously be argued that the Voter ID Law should be stricken because it works.

From the perspective of *amicus* Sadler -- who once had to remedy an Election Day issue of thousands of voters wrongly purged from the rolls by Marion County's Voter Registration Board -- a matter of thirty-two people deciding not to verify provisional ballots in a settled contest was hardly the cataclysm predicted by Petitioners. If historical fact, not speculative rhetoric, is indeed this Court's guide, then the judgments of each court to have evaluated (and flatly rejected) Petitioners' claims should be affirmed.

Failing their own burden, Petitioners' fingers have necessarily pointed outward, claiming that the State is unable to prove a need for the Voter ID Law. First, Petitioners state that the Respondents did not produce historical evidence of prosecutions for voter impersonation fraud; therefore, they contend, criminalizing voter fraud is sufficient to deter it. In like manner, Petitioners assert that if signature comparisons are good enough to determine the validity of absentee ballots, then they must necessarily be good enough to prevent in-person voting fraud. These arguments amount to little more than a pair of non sequiturs.

Initially, the mere absence of prosecutions for voter impersonation fraud is not the same as evidence that

no such fraud has taken place. Indeed, in *Burson v. Freeman*, a plurality of this Court rejected the argument that statutes criminalizing voter intimidation were an effective substitute for regulations establishing restricted zones around polling places. 504 U.S. at 206-07. Those criminal statutes, the Court said, fell "short of serving a State's compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 28 (1976)). Similarly, statutes criminalizing voter impersonation fraud are necessarily ineffective when enforcement depends upon a method (signature comparisons) that provides no meaningful way to determine whether a voter is falsely identifying himself. At bottom, Petitioners' argument is not just that "there is absolutely no evidence of voter-impersonation fraud in Indiana," Br. of Pet. Ind. Democratic Party at 43, but also that Indiana should take no meaningful steps to look for it. That argument is simply a variation on a theme already rejected by this Court. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (legislatures should "be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively").

Separately, Petitioners contend that because Indiana uses signature comparisons for absentee ballots, those comparisons must necessarily be good enough to prevent voter fraud in all circumstances. Such a one-size-fits-all approach, however, is incompatible with the realities of election administration and ignores the substantial difference between in-person and absentee voting. For example, there is no possible benefit to having someone copy

their photo ID then mail it in with their absentee ballot. To what would an election official compare the photo? Moreover, the vast majority of votes are cast in person, not by mail. Thus, the safeguards provided by the Voter ID Law apply to the greatest number of votes possible, while leaving open the option of absentee voting to those who need it. And, just because the legislature has not eliminated the use of signature comparisons in absentee voting does not mean it must wait to address the security of in-person voting. *Cf. McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969) ("[A] legislature traditionally has been allowed to take reform one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.") (internal quotations omitted). Accepting Petitioners' position would be tantamount to imposing a Hobson's choice on every State considering additional safeguards for its elections: address all potential sources of fraud at once, and in the same manner, or do nothing at all.

If anything, the diverse views regarding the wisdom of voter-identification laws such as Indiana's reveals that the issue is a "difficult problem[] of policy." *Smith v. Robbins*, 528 U.S. 259, 273 (2000). In such a case, this Court has an "established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions" to those problems. *Id.*; *see also Crawford v. Bd. of Educ.*, 458 U.S. 527, 535 (1982) ("We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and of its ability to experiment. This interpretation has no support in the decisions of this Court."); *Sailors v. Bd.*

of Educ., 387 U.S. 105, 111 (1967) ("We see nothing in the Constitution to prevent experimentation."); *cf. New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

The goals in administering an election are straightforward: 100-percent turnout, no fraud, and complete confidence that every vote cast is worth the same as the next. Realistically, those goals may never be achieved. But they most assuredly will not be if States must remain tied to the election methodology utilized for generations. As new technologies emerge, and existing technologies advance, States will necessarily examine the utility of those technologies in improving the election process. For example, Indiana is currently studying the merit of centralized voting centers as a way to conduct elections more efficiently (which would increase voters' access to the ballot while also increasing the need for photo ID).[16] Such innovation will come to a halt if States must face litigation based solely on knee-jerk, speculative claims at every turn.

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[16] *See* Andrea Neal, Editorial, *A Tale Of 2 Cities' Elections*, The Indianapolis Star, May 17, 2007, at 14 (describing effective use of voting centers in State pilot project).

In sum, States must be given latitude to experiment in the conduct of their elections, including the means by which the integrity of those elections is ensured. Although such experimentation must surely take place within a constitutionally designed laboratory, disagreement with legislative judgments is not equivalent to constitutional infirmity. While Petitioners might opt to implement different safeguards against in-person voter fraud, or no safeguards at all, that does not make the Voter ID Law invalid.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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